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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 674

JOHN THOMAS, WILLIAM McCOY, JOHN SALTERS, ISAAC SIZEMORE, RAY TRANTHAM, ELLIS COLEMAN, JR., LEE LOONEY, JOHN YATES, and CHARLES TAYLOR,

Petitioners,

vs:

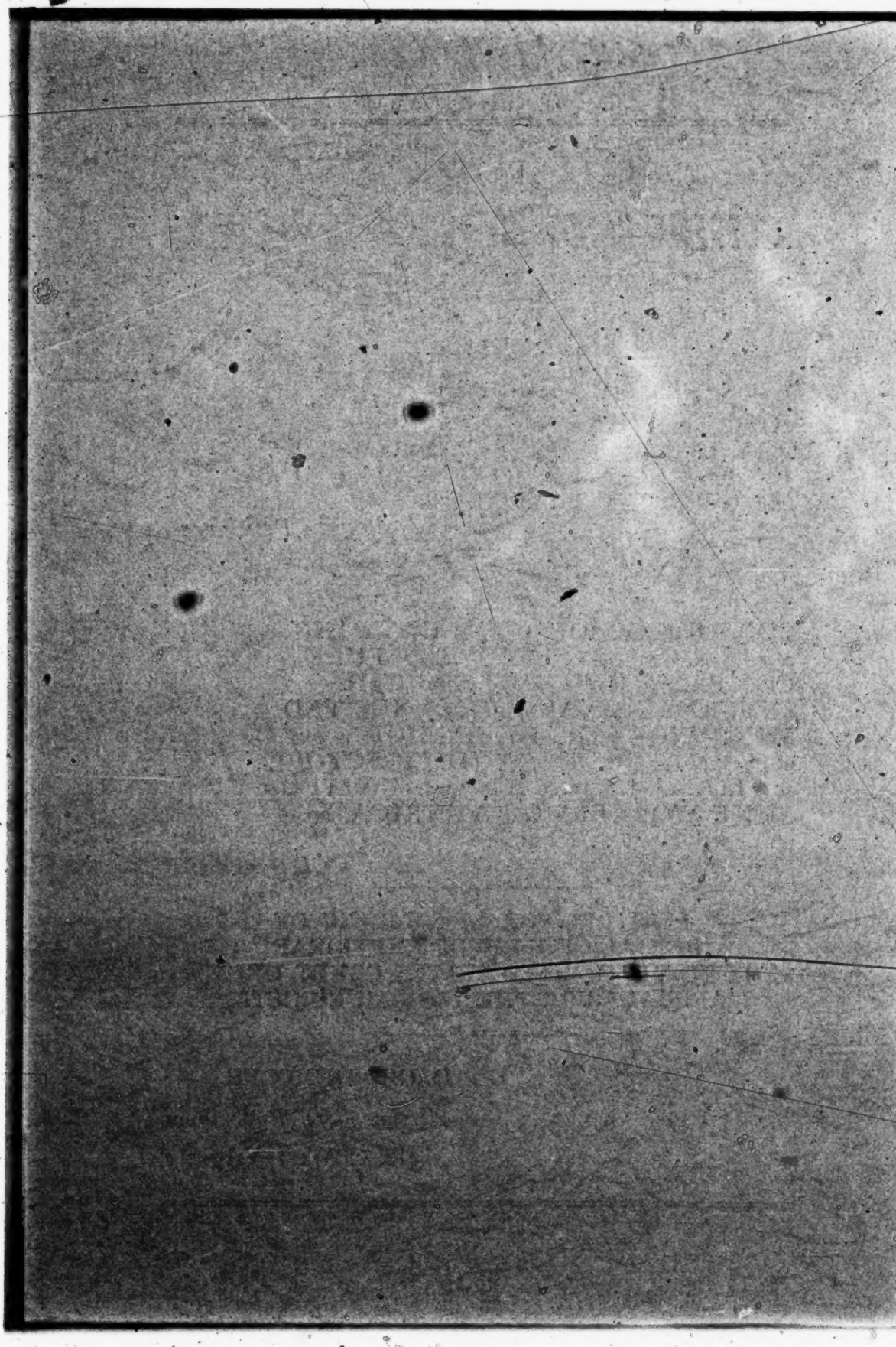
CONSOLIDATION COAL COMPANY, a corporation, (POCAHONTAS FUEL COMPANY DIVISION) and THE INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, an unincorporated association (DISTRICT 29), and LOCAL UNION NO. 9690, UNITED MINE WORKERS OF AMERICA, an unincorporated association,

Respondents.

PETITION FOR RE-HEARING OF DENIAL OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners pray that this Court grant re-hearing of its order of December 11, 1967, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit in the above-entitled case as prayed for in the petition filed October 2, 1967, herein.

REASON FOR GRANTING RE-HEARING AND ISSUING THE WRIT

The judgment of dismissal by the Circuit Court of Wyoming County, West Virginia was in law one "without prejudice". Invoking res judicata upon the basis thereof in the United States courts is a clear denial of due process of law.

The judgment which the Circuit Court of Appeals has declared to be one upon "the merits" was that of the Circuit Court of Wyoming County, West Virginia, of March 8, 1965 (App. C, Petition for Certiorari). That order sustained motions to dismiss, without assigning grounds, cause or reason, and there was no written opinion. Those motions were expressly made pursuant to and grounded solely upon Rule 12(b) of the West Virginia Rules of Civil Procedure, which is:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim

for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

The interpretative note thereto reads:

"A summary judgment is a dismissal with prejudice, whereas, a motion to dismiss under Rule 12(b), or a motion for judgment on the pleadings under Rule 12(c) *is not a dismissal with prejudice.*" (Emphasis ours).

In *United States Fidelity and Guaranty Company, a corporation, etc. v Eades,* (W. Va. Nov. 9, 1965) 144 S. E. (2d) 703, the West Virginia Supreme Court said:

> "If a summary judgment is entered under Rule 56 R.C.P. it is a dismissal with prejudice; whereas, a judgment sustaining a motion to dismiss under Rule 12(b) R.C.P. for the failure to state a claim upon which relief could be granted is not a dismissal with prejudice."

Therefore, if the judgment of the Circuit Court of Wyoming County in this case is, in law, "without prejudice" to the institution of a new action in West Virginia then it is "without prejudice" to an action in an United States district court having concurrent jurisdiction of the subject matter.

"Due process of law" is certainly not served by a holding of the Fourth Circuit Court of Appeals to the effect that such a judgment in a State court is res judicata upon the presumption that in dismissing "without prejudice" the State court is nevertheless presumed to

have possibly (and in the opinion of the Fourth Circuit more or less erroneously) adjudicated several of multiple grounds, which, if the judgment had been with prejudice, would have been deemed decisions on the merits. Inasmuch as the State court also had before it grounds challenging jurisdiction of the subject matter but did not specify which grounds it based its dismissal upon, this paradoxial situation is cured by the adoption of the rule expounded in *Edwards v Bodkin,* 267 F. 1004; 1 *B Moore's Federal Practice, Section* 0.409(7); *Hartmann v Time, Inc.* (C.C.A. 3rd, 1949), 166 F. (2d) 139, 1 A.L.R. (2d) 370, cert. den. 334 U. S. 838, 68 S. Ct. 1495, 92 L. Ed. 1763; *Freeman on Judgments,* 5th Ed. Sec. 749; *Re-statement of the Law, Judgments,* 49c, —all of which authorities are cited and considered in the petition for certiorari (p. 7-9).

It is true petitioners in their search for trial of their complaints have knocked on many doors. They had to exhaust the contractual remedy and found it was fraudulently manipulated against them. They applied to the National Labor Relations Board—and in its discretion issuance of a complaint was refused—without grounds or opinion. They turned to the closest forum, where witnesses were available and expense might be less, and were met with motions to dismiss which the State court sustained without assigning grounds or reason. In the interim they were denied the use of discovery procedure. They appealed to the West Virginia Supreme Court and that body declined to grant an appeal—again no assignment of reason or opinion. Relying upon what they deemed due process of law, since the key ground presented upon dismissal was jurisdiction of the subject matter, they turned to the United States District Court—time was getting longer. That Court found the charge of fraud was not alleged with sufficient specificness. They appealed and the Fourth Circuit, being of the opinion the complaint was not demurrable and that the United States District Court had jurisdiction of the subject matter, nevertheless invoked

res judicata to once again close the door to a hearing of the facts.

It is no wonder that one of the petitioners—not learned in the legal or technical meaning of "hearing"—wrote to counsel,—"You say you are going to try for a rehering. That is a laugh. We don't have a hering yet."

CONCLUSION

For the reasons set forth above and in the petition for the writ of certiorari it is respectfully urged that rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Court of Appeals of the Fourth Circuit.

Respectfully submitted

D. GROVE MOLER

Attorney for Petitioners

Mullens, West Virginia

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

D. GROVE MOLER

Counsel for Petitioners